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 KAISER FOUNDATION HEALTH PLAN
 OF THE NORTHWEST, dba KAISER PERMANENTE

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

PAMELA F. MONETTE,

Plaintiff,

vs.

LEGACY EMANUEL HOSPITAL &
 HEALTH CENTER, doing business as
 LEGACY EMANUEL MEDICAL
 CENTER; OREGON ANESTHESIOLOGY
 GROUP, PC; PACIFIC SURGICAL, PC;
 RADIOLOGY CONSULTANTS, INC.;
 PACIFIC NEUROSURGICAL, P.C.;
 JEFFERSON CHEN M.D.; MATTHEW A.
 SOLOMON, D.O.; K. DEAN GUBLER,
 D.O.; JAMES GILMORE, M.D.; MELISSA
 RADECKI, M.D.; RONALD BARBOSA,
 M.D.; JOSEPH WILLIAMS, M.D.;
 WILLIAM LONG, M.D.; KAISER
 FOUNDATION HEALTH PLAN OF THE
 NORTHWEST, doing business as KAISER
 PERMANENTE,

Defendants.

Case No.

**NOTICE OF REMOVAL OF ACTION
 UNDER 28 U.S.C. § 1441(b)
 (FEDERAL QUESTION)**

Complaint filed: March 18, 2015

**TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT
 OF OREGON: NOTICE OF REMOVAL**

1. PLEASE TAKE NOTICE that pursuant to 28 U.S.C. §§ 1441 and 1446,
 Defendant, KAISER FOUNDATION HEALTH PLAN OF THE NORTHWEST, improperly
 named as doing business as KAISER PERMANENTE (hereinafter, "Defendant Kaiser") hereby

1 removes this action from Circuit Court of the State of Oregon for the County of Multnomah
 2 (Case No. 15CV00583) to the United States District Court for the District of Oregon. In support
 3 of this Notice of Removal, Defendant states as follows:

4 2. On March 18, 2015, a civil action was commenced in the Circuit Court of
 5 Oregon, County of Multnomah, (1021 S.W. 4th Avenue, Portland, Oregon 97204) by Plaintiff
 6 PAMELA F. MONETTE, (hereinafter, "Plaintiff"). That case is presently docketed in the
 7 Multnomah County Circuit Court as Case Number 15CV00583. A complete copy of the Court
 8 file, including the Complaint for Damages, is attached hereto as Exhibit A.

9 3. Defendant Kaiser was served on or about March 31, 2015. This Notice of
 10 Removal is timely filed since it is being filed within 30 days of the date of service as required by
 11 28 U.S.C. § 1446(b). No further proceedings are pending at this time. A true and correct copy
 12 of the Proof of Service of Summons and Complaint is attached hereto as Exhibit B.

13 4. Neither Defendant Kaiser nor any of the other defendants has filed an Answer at
 14 this time.

15 5. Venue is proper with the United States District Court of Oregon under 29 U.S.C.
 16 § 1132(e)(2) in that this action is presently pending in the State of Oregon, County of
 17 Multnomah, which is within the venue of the United States District Court for the District of
 18 Oregon.

19 6. There are two independent and alternative grounds for removal as set forth below:
 20 (1) federal question removal under 28 U.S.C. § 1441(a) and (b) based on Medicare complete
 21 preemption where the gist of the complaint is the payment of benefits under a Medicare plan, and
 22 (2) where the claims are "inextricably intertwined" with a claim for Medicare benefits.

23 **I. GENERAL AVERMENTS IN SUPPORT OF REMOVAL**

24 7. Defendant Kaiser is an Oregon corporation and provider of health insurance, and
 25 the provider of Plaintiff's health insurance, and is duly formed and authorized to do business in
 26 the state of Oregon.
 27
 28

8. Plaintiff, a Medicare enrollee, alleges that Defendant Kaiser denied payment under her health plan coverage. (Amended Complaint, ¶¶ 37-38.) Any duty owed by Plaintiff's health plan necessarily involves the federal preemption provisions of the Title XVIII of the Social Security Act ("the Medicare Act). Whether Plaintiff was enrolled in a traditional Medicare plan or under a Medicare Advantage Plan ("MA"), her claims are ultimately subject to federal preemption under the Medicare Prescription Drug, Improvement and Modernization Act of 2003 ("MMA"). It was Congress's intent to cast a wide net of preemption, encompassing virtually all claims against a Medicare plan, including claims concerning coverage determinations, benefits, inclusion or treatment of providers, utilization review, appeals, grievance procedures, and all other aspects of the administration of the plan. To the extent Plaintiff's claim hinges on standards established under her Medicare plan, the Medicare regulations establish federal preemption under the Medicare Act which covers state law claims. 42 U.S.C., § 1395w-26(b)(3); 42 C.F.R §422.402.

9. A state law is preempted where it regulates conduct in a field that Congress intended the federal government to occupy exclusively. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270, 2275, 110 L. Ed. 2d 65 (U.S. 1990). Preemption is fundamentally a question of the intent of Congress, which has the authority to define the extent to which federal statutes preempt state law. *Id.* Congress has made its intent known through explicit statutory language regarding Medicare preemption.

10. Congress's express intent that "any State law or regulation (except those relating to licensing and solvency) ... shall be superceded" is clear. 42 U.S.C., § 1395w-26(b)(3). The Medicare preemption provision states that federal standards would supersede state law and regulations with respect to Medicare Advantage plans to the extent that such law or regulation are "inconsistent" with such standards. Thus, any Medicare program, which provides medical benefits to seniors through managed care, operates under federal rules.

11. The Courts also recognize the broad preemptive scope of the Medicare Act. The Supreme Court has identified two circumstances in which a claim "arises under" the Medicare Act: (1) where the "standing and the substantive basis for the presentation of the claims" is the

Medicare Act, and (2) where the claims are “inextricably intertwined” with a claim for Medicare benefits.” *Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134, 1141 (9th Cir. 2010)(citing *Heckler v. Ringer*, 466 U.S. 602, 614-615, 104 S. Ct. 2013, 2021, 80 L. Ed. 2d 622 (1984). Even where a cause of action appears to be a “cleverly concealed claim for benefits,” the Ninth Circuit has confirmed that such state law claims “arise under” the Medicare Act. *Kaiser v. Blue Cross of California*, 347 F.3d 1107, 1112 (9th Cir. 2003). The claim against Defendant Kaiser in this matter is a direct claim for benefits under a Medicare plan. As such, the Medicare Act, and therefore federal law, completely preempt these claims and removal to federal court under federal question jurisdiction is appropriate.

II. REMOVAL UNDER 28 U.S.C. § 1441(a) AND (b) - MEDICARE PREEMPTION

12. Plaintiff’s state court Complaint alleges claims for reimbursement for medical services provided to a Kaiser member enrolled in Kaiser’s Medicare Advantage Plan.

13. The Medicare Act, 42 U.S.C. § 1395, et seq., establishes a federally funded health insurance program that is administered by the federal Centers for Medicare and Medicaid Services (“CMS”) (formerly known as the Health Care Financing Administration) of the United States Department of Health and Human Services. The claim is completely preempted by Part C of the Medicare Act, 42 U.S.C. § 1395w-21 et seq., in accordance with the preemption provisions of 42 C.F.R. § 422.402 (2005) and 42 U.S.C. § 1395w-26(b)(3), as amended and expanded by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Public Law 108-173 (2003), and is properly removed.

14. A clear framework exists for determining whether a claim arises under Medicare for purposes of the exclusive review provisions of the Medicare Act. The two part test established in *Heckler v. Ringer*, 466 U.S. 602, 614-615 (1984), is as follows: A claim arises under Medicare if (1) both the standing and the substantive basis for the presentation of the claim is the Medicare Act, or (2) the claim is inextricably intertwined with a claim for Medicare benefits.

15. Removal is appropriate under the complete preemption doctrine where a federal statute expressly preempts state law standards and provides exclusive federal remedies. *See, e.g.*,

1 *Beneficial National Bank v. Anderson*, 539 U.S. 1, 123 S.Ct. 2058 (2003). The Medicare Act and
 2 its regulations (1) expressly preempt Plaintiff's claims relating to Medicare members in all
 3 causes of action and (2) provide exclusive federal remedies. Plaintiff's claims with respect to a
 4 Medicare member is expressly preempted by the provisions of 42 C.F.R. § 422.402 and 42
 5 U.S.C. § 1395w-26(b)(3).

6 16. The Medicare Act also provides an exclusive federal remedy for claims pertaining
 7 to the improper denial or other administration of plan benefits as set forth in 42 U.S.C. § 405(g)
 8 and (h), 42 U.S.C. § 1395ff, 42 U.S.C. § 1395ii, 42 U.S.C. § 1395w-22(f) & (g), and 42 C.F.R. §
 9 422.560 et al. (2005). This mandatory administrative process applies to claims brought by
 10 Plaintiff as assignee of a plan participant. 42 C.F.R. § 422.113 (2005); 65 Fed. Reg. 40203
 11 (2000) ("a dispute over whether the conditions for Medicare coverage for post-stabilization
 12 services under § 422.100 and § 422.113 have been met could be resolved in an enrollee's appeal
 13 ... or in an appeal by a provider"). Pursuant to 42 U.S.C. § 1395w-22(g)(5) and 42 U.S.C. §
 14 1395ff, incorporating 42 U.S.C. § 405(g), the federal courts have exclusive jurisdiction for
 15 review of claims once this mandatory administrative process has been exhausted.

16 17. Removal is appropriate under the "complete preemption" doctrine where a federal
 17 statute: (1) expressly preempts state law standards; and (2) provides exclusive federal remedies.
 18 *See, e.g., Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 156 L. Ed. 2d 1, 8-9, 123 S. Ct. 2058,
 19 2063 (2003). Because the Medicare Act expressly preempts and provides the exclusive remedy
 20 for Plaintiff's claims with respect to a Kaiser member enrolled in a Medicare Advantage Plan,
 21 the State Court Action is removable under the complete preemption doctrine. *See, Dial v.*
 22 *Healthspring of Ala., Inc.*, 501 F. Supp. 2d 1348 (S.D. Ala. 2007) (state law causes of action
 23 completely preempted by Medicare Act and properly removable).


24 **III. PROCEDURAL AVERMENTS**

25 18. As required by section 28 U.S.C. § 1446, Plaintiff will be given notice of the
 26 filing of this Notice of Removal, and a true and correct copy of this Notice of Removal will be
 27 filed with the Clerk of the Circuit Court of Oregon for the County of Multnomah.
 28

1 19. Defendant files this Notice of Removal without waiving and specifically reserving
2 all objections and defenses which it may have under Rule 12(b) of the Federal Rules of Civil
3 Procedure and any other rules applicable to this motion.

4 WHEREFORE, Defendant prays that the above action now pending against it in the
5 Circuit Court of Oregon, County of Multnomah be removed therefrom to this United States
6 District Court for the District of Oregon.

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8 Dated: April 29, 2015

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10 By 
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18 THE NORTHWEST, doing business as KAISER
19 PERMANENTE
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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2015, I electronically filed the foregoing NOTICE OF REMOVAL OF ACTION UNDER 28 U.S.C. § 1141(b) (FEDERAL A QUESTION) with the Clerk of the Court using the CM/ECF system which will automatically send an e-mail notification of such filing to the following attorneys:

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/s/

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